UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SVENSKA ORTMEDICINSKA INSTITUTET, AB and GEORG WIKMAN, Plaintiffs	
v.	Civil No. 00-368-P-C
RICHARD DESOTO, SWEDISH HERBAL INSTITUTE, LTD., SWEDISH HERBAL INSTITUTE, SWEDISH HERBAL INSTITUTE, LTD., AND SHI VENTURE CORP., Defendants	

Gene Carter, District Judge

MEMORANDUM OF DECISION AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS

Plaintiffs Svenska Ortmedicinska Institutet, AB ("Svenska") and Georg Wikman ("Wikman") have filed a twelve-count Amended Complaint asserting claims against Defendants Richard DeSoto ("DeSoto"), Swedish Herbal Institute, Ltd., Swedish Herbal Institute, Swedish Herbal Institute, Ltd.,[1] and SHI Venture Corp. (collectively "corporate Defendants") for Breach of Express Contract (Count I); Breach of Implied Contract (Count II); Recovery in Quasi-Contract (Count III); Fraud (Count IV); Collection on Promissory Note (Count V); Unjust Enrichment (Count VI); Misappropriation and Conversion (Count VII); Alter Ego (Count VIII); Bad Check (Count IX); Fraudulent Transfer, 14 M.R.S.A. § 3575 (Count X); Fraudulent Transfer, 14 M.R.S.A. § 3576(1) (Count XI); and Uniform Deceptive Trade Practices Act, 10 M.R.S.A. § 1211 *et seq*. (Count XII).

[1] From Plaintiffs' Amended Complaint, the Court understands the distinction between the two identically named Swedish Herbal Institute, Ltd. entities to be that one is incorporated in New York and the other is incorporated in Maine.

Defendants filed a Motion to Dismiss under Rule 12(b)(6), asserting that the Amended Complaint fails to state a claim upon which relief may be granted. For the reasons that follow, the Court will deny Defendants' Motion to Dismiss, compel the parties to arbitrate Counts I through IX and Count XII, and stay Counts X and XI pending arbitration.

I. FACTS

The Amended Complaint makes the following relevant factual assertions. Plaintiff Svenska is a Swedish corporation involved in the research, development, and sale of herbal extracts. Wikman is Svenska's principal owner. DeSoto is principal owner of the four Defendant corporate entities bearing like names – Swedish Herbal Institute, Ltd., Swedish Herbal Institute, Swedish Herbal Institute, Ltd., and SHI Venture Corp. Between 1993 and 1998, Defendant DeSoto and various of his Swedish Herbal Institute corporate entities entered into four agreements with Plaintiffs relating to the licensing and distribution of Plaintiffs' herbal extracts. Complaint Exs. A, B, C, D. Two of the agreements include arbitration provisions. Complaint Exs. A and C. The contracts relevant to the claims made in this suit were all signed by Wikman on behalf of Svenska and by DeSoto on behalf of Swedish Herbal Institute, Ltd., Swedish Herbal Institute, Swedish Herbal Institute, Ltd., or SHI Venture Corp. Complaint Exs. A, B, C, D. Working through the four corporate Defendants, Defendant DeSoto obtained herbal products and loans from Svenska. Defendants currently owe Plaintiffs more than $600,000.

In June 2000, DeSoto and his corporate entities prepared and presented a fraudulent purchase order to induce Svenska to provide them with enough herbal products to sustain their operation for approximately a year. DeSoto's corporate entities provided a $20,000 down payment check, and then subsequently stopped payment on the check. Among the other allegations in the Amended Complaint, Plaintiff asserts that in January 1996, DeSoto and his wife fraudulently

conveyed their residence in an effort to remove assets from the reach of their creditors.

II. DISCUSSION

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor." *Phil v. Massachusetts Dep't of Educ*., 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if "it appears to a certainty that the plaintiff would be unable to recover under any set of facts." *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Tobin v. University of Maine Sys*., 59 F. Supp.2d 87, 89 (D. Me. 1999).

Defendants argue that this lawsuit should be dismissed because the claims are required to be arbitrated under the agreements between the parties. Plaintiffs do not question the validity of the contractual arbitration provisions, but respond that the action should not be dismissed because not all the claims or parties are subject to arbitration. Specifically, Plaintiffs assert that their tort claims are not subject to arbitration. Plaintiffs also argue that since neither Plaintiff Wikman nor Defendant DeSoto was a party to any of the agreements, the claims asserted by Wikman and the claims asserted against DeSoto cannot be submitted to arbitration. Finally, Plaintiffs argue that the claims the Court deems not subject to arbitration should be stayed pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-307, rather than dismissed. Although none of the parties have expressly requested the Court to refer this action to arbitration, the essence of Defendants' argument to dismiss is that the agreements require the arbitration of all the claims asserted in the Amended Complaint. The Court will, therefore, treat Defendants' Motion to Dismiss as also requesting that the Court compel arbitration.

A. Enforceability of the Arbitration Clause

The FAA governs whether a contract is arbitrable. The FAA provides that

> a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. In 1970 Chapter Two, 9 U.S.C. §§ 201-208, was added to the FAA to address the issues involving international commerce. Chapter Two implemented the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, entered into force for the United States June 7, 1959, 21 U.S.T. 2571, T.I.A.S. No. 6997, 330 U.N.T.S. 38, *reprinted at* 9 U.S.C. § 201 note (1999). Section 202 of the FAA provides in part that:

> An arbitration agreement . . . arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention.

9 U.S.C. § 202. A court in the United States faced with a request to refer a dispute governed by Chapter Two to arbitration performs a "very limited inquiry" into whether an arbitration agreement exists and falls within the Convention's coverage. *See DiMercurio v. Sphere Drake Insurance, PLC*, 202 F.3d 71, 74 (1st Cir. 2000) (citing *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186 (1st Cir. 1982)). The court must consider four preliminary questions:

> (1) is there a written agreement to arbitrate the subject of the dispute? (2) does the agreement provide for arbitration in the territory of a signatory of the Convention? (3) does the agreement arise out of a commercial relationship? (4) is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states?

DiMercurio, 202 F.3d at 74 (citing *Ledee*, 684 F.2d at 186-87). If the arbitration provision satisfies the four prerequisites, it is enforceable under the Convention unless it is "null and void,

inoperative or incapable of being performed." Convention Art. II (3). Although the parties do not raise any of these issues in their pleadings filed in connection with Defendants' Motion to Dismiss, the Court finds it necessary to address these issues in order to resolve Defendants' Motion to Dismiss.

The first of the four questions addresses both the form and the scope of the arbitration agreement. The arbitration agreements at issue provide "[a]ny dispute in connection with this agreement shall be finally settled by arbitration."[2] Complaint Exs. A and C. The Court discusses *infra*, sections B and C, the precondition relating to whether the parties have agreed to arbitrate the subject of the dispute. The next three questions, all answered in the affirmative, address the citizenship of the contracting parties and the nature of their relationship. The agreements provide that arbitration of disputes shall take place in either Sweden or Maine and both Sweden and the United States are parties to the Convention. The agreements at issue here all arise out of a commercial relationship. The verified Amended Complaint alleges that the parties entered into agreements to distribute Plaintiffs' products throughout the United States and that Plaintiff Svenska sent the herbal product from Sweden to the United States for Defendants to distribute. Finally, Plaintiffs are not American citizens. The verified Amended Complaint alleges that Svenska is a Swedish corporation and Wikman is a Swedish citizen. Except for the issue concerning the scope of the parties' agreement to arbitrate discussed *infra,* the Court concludes that the arbitration

[2] There are potentially two arbitration provisions applicable to this case. The parties do not agree on which of the two contractual provisions applies. The provisions use identical language to express the parties' intent as to the scope of the arbitration. The language of the arbitration provisions diverge on the place of arbitration and law applicable to the dispute. *Compare* 1993 Agreement, Complaint Ex. A ("Any dispute in connection with this agreement shall be finally settled by arbitration in accordance with the laws of Sweden – Lag (1929.145) om Skiljeman. The proceedings shall take place in Goteborg, Sweden.") *with* 1996 Agreement, Complaint Ex. C ("Any dispute in connection with this agreement shall be finally settled by arbitration in accordance with the Rules and Regulations of the American Arbitration Association. Arbitration proceedings shall take place in York, Maine.").

provisions at issue satisfy the enforceability questions and that the provisions appear to be neither null nor void.

B. Claims Asserted by Plaintiffs Against the Corporate Defendants

Counts I through IX of the Amended Complaint are made by Svenska, and Count XII is made by Wikman and Svenska. The Complaint alleges that Wikman is Svenska's principal owner and that DeSoto is principal owner of Swedish Herbal Institute, Ltd., Swedish Herbal Institute, Swedish Herbal Institute, Ltd., and SHI Venture Corp. The contracts relevant to the claims made in this suit were all signed by Wikman on behalf of Svenska and by DeSoto on behalf of one of the corporate Defendants. Complaint Exs. A, B, C, D. By signing the agreements, Wikman bound Svenska and DeSoto bound the corporate Defendants to the contractual provisions.

Plaintiffs do not contest that Counts I, II, III, V, VI, VIII, and IX are subject to the contractual agreement to arbitrate. Plaintiffs do argue, however, that the tort claims, fraud (Count IV) and misappropriation of trade secrets and conversion (Count VII), are not subject to the contractual agreement to arbitrate because the arbitration provisions in the agreements are limited to contract claims. Plaintiffs rely on *Tracer Research Corp. v. National Environmental Services, Co.*, 42 F.3d 1292 (9th Cir. 1994), and *Armada Coal Export, Inc. v. Interbulk, Ltd.*, 726 F.2d 1566 (11th Cir. 1984), for support. The courts in both these cases held that the arbitration provisions at issue did not encompass noncontractual claims. In *Tracer Research Corp.*, the court held that a tort claim for misappropriation of trade secrets was not arbitrable where the arbitration clause in the parties' terminated licensing agreement covered disputes "arising out of" the agreement. The court interpreted the "arising out of" language in the agreement to cover only those disputes directly involving the construction and performance of the contract itself. Significantly, the court noted that the agreement omitted reference to a broader class of claims "relating to" an agreement.

Tracer Research Corp., 42 F.3d at 1295. Similarly, in *Armada Coal Export*, the court found that although a connection existed between the plaintiff's claims for wrongful attachment and conversion and the charter party relationship, the connection was not close enough to render the claims a dispute "arising during the execution, or performance, of the charter party" as required by the charter party agreement. *Armada Coal Export, Inc.*, 726 F.2d at 1568. The Court finds these cases distinguishable because, unlike the "arising out of" type language at issue in them, the language of the agreements at issue in this case broadly provides for arbitration of "[a]ny dispute in connection with this agreement." Exs. A and C. The "in connection with" language found in the instant agreements does not restrict the types of claims that are subject to arbitration to the same extent as the contractual language in the cases relied upon by Plaintiff. *See Bercovitch v. Baldwin School, Inc*, 133 F.3d 141, 148 (1st Cir. 1998) (concluding that the agreement between the parties to arbitrate "any and all disputes arising out of [the school's] By-Laws or their application or the application of any rule, regulation, policy, resolution or act or contract implemented or carried out pursuant to these By-Laws" covered the ADA claims brought by plaintiffs). In addition, federal policy favoring arbitration requires that "any doubts concerning the scope of an arbitration issue is to be resolved in favor of arbitration." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983). The Court concludes, therefore, that the tort claims in Counts IV and VII should be referred to arbitration in this case because they are disputes connected to the performance of the agreements.

Plaintiffs' claim for violation of Maine's Uniform Deceptive Trade Practices Act, 10 M.R.S.A. § 1211 *et seq*. (Count XII), is made on behalf of both Wikman and Svenska. Plaintiff Wikman argues that because, in his individual capacity, he is not a party to the contracts, he is not bound to the arbitration provision of the contracts. Aside from his status as the principal

representative of Svenska, the Amended Complaint does not include any factual allegations that would appear to permit Wikman to assert any individual claims against Defendants. The claim asserted by Wikman in Count XII of the Amended Complaint must necessarily derive from the fact that he is the principal owner and agent of Svenska.[3] Therefore, for the purposes of this motion, the Court will assume that Wikman's claims derive from his status as an agent of Svenska.[4] The claim made by Svenska and Wikman in Count XII under Maine's Deceptive Trade Practices Act is sufficiently connected to the contracts to require arbitration.

In sum, the Court holds that Plaintiffs' claims in Counts I through IX and Count XII made against the corporate Defendants are all clearly connected to the agreements in this case and, as such, are governed by the contracts' provisions to arbitrate disputes. All of those claims made against the corporate Defendants are properly referred to arbitration.

C. Claims Asserted by Plaintiffs Against Defendant DeSoto

The Court now turns to the claims made by Plaintiffs against DeSoto. Plaintiffs advance the identical argument to oppose Defendants' Motion to Dismiss DeSoto as Plaintiffs asserted with respect to Plaintiff Wikman. That is, because DeSoto is not a party to the contracts in any individual capacity, the claims against him are not subject to arbitration or dismissal. For the same reasons the Court found with respect to the claims made by Wikman, the claims asserted in Counts I through IX and XII against Defendant DeSoto are subject to the arbitration provisions. Those claims must necessarily arise out of DeSoto's status as the agent for the corporate Defendants.

[3] Defendants assert that none of Plaintiffs' claims seek recovery on behalf of Wikman, but they do not move to dismiss Wikman on this basis. Although it is certainly arguable that Wikman does not have any basis to assert individual claims against Defendants, Defendants have not raised this as a basis to dismiss Wikman and, thus, the Court will not rule on that issue at this time.

However, the claims made by Svenska and Wikman in Counts X and XI under Maine's Fraudulent Transfer Act do not relate to Defendant DeSoto in his representative capacity. In those statutory fraud claims, Plaintiffs allege that DeSoto transferred personal assets into a trust to hinder, delay, or defraud the creditor Plaintiffs. Those claims against Defendant DeSoto in his individual capacity are not sufficiently connected to the contracts to oblige the Court to send those claims to arbitration. If some claims in a complaint are not properly arbitrable, the FAA authorizes a court to stay the action while the arbitrable claims are resolved. *See* 9 U.S.C. § 208 ("Chapter 1 applies to actions and proceedings brought under [chapter 2] to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States."); 9 U.S.C. § 3 (Upon application of one of the parties, a court "shall . . . stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement."). The Court will, therefore, deny Defendants' motion to compel arbitration on Counts X and XI. In an exercise of its discretion under the FAA, the Court will stay proceedings on Counts X and XI pending the arbitration and deny Defendants' Motion to Dismiss Counts X and XI.

D. The Location of the Arbitration

Plaintiffs argue that if the Court orders the parties to arbitrate their claims, such arbitration must take place in Goteborg, Sweden, and in accordance with Swedish law. Defendants counter that the arbitration should take place in York, Maine. Defendants maintain that because there is a conflict between the arbitration provision in the 1993 agreement, which provides for arbitration in Sweden, and the 1996 agreement, which provides for arbitration in Maine, it is Plaintiffs' burden to identify which disputes arose under the 1993 agreement and which arose under the 1996 agreement. *See* Complaint Exs. A and C. Defendants contend that because Plaintiffs have not met

[4] Plaintiffs' position is somewhat curious. It seems that Plaintiffs want Wikman to be a party to the contracts for purposes of

their burden, Defendants are entitled to choose the location of the arbitration and Maine is their choice.

The FAA permits a court to direct that arbitration of an international dispute be held in accordance with the locale specified in the agreement. *See* 9 U.S.C. § 206. Defendants have cited no authority to persuade the Court of their asserted entitlement to choose the arbitration forum. Defendants have correctly noted that the agreements at issue contain two forum-selection provisions. The first provision, contained in the 1993 agreement, requires the parties to submit their disputes to an arbitrator in Goteborg, Sweden, to determine the rights of the parties according to the laws of Sweden. Complaint Ex. A, ¶ 20. The second provision, contained in the 1996 agreement, requires the parties to submit their disputes to arbitration in York, Maine, to determine the rights of the parties in accordance with the Rules and Regulations of the American Arbitration Association. Complaint Ex. C, Article 21. The parties amended the 1996 agreement in 1998. The 1998 amendment does not specifically address the arbitration issue, but it does provide that "the 1993 Distribution and Licensing Agreement between the parties will remain in full force and effect." Complaint Ex. D. Hence, the last expression of the parties' intent was that the parties arbitrate disputes according to the 1993 agreement in Goteborg, Sweden, and in accordance with Swedish law. The Court will enforce the parties' final expression of their intent to arbitrate in Sweden.

III. CONCLUSION

It is **ORDERED** that Defendants' Motion to Dismiss be, and it is hereby, **DENIED**. It is further **ORDERED** that Counts I through IX, and Count XII be, and they are hereby, **REFERRED** to an arbitrator pursuant to the 1993 agreement, to be arbitrated in Goteborg, Sweden, and in

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asserting the claims in the Amended Complaint, but then Plaintiffs do not want Wikman to be a party to the contract for purposes

accordance with Swedish law. It is further **ORDERED** that proceedings on Counts X and XI be, and they are hereby, **STAYED** pending arbitration.

Gene Carter
District Judge

Dated at Portland, Maine this 22nd day of February, 2001.

SVENSKA ORTMEDICINSKA INSTITUTET AB plaintiff	SAMUEL SHERRY, ESQ. [COR LD NTC] METROPOLITAN LEGAL CENTER, PA PO BOX 18201 PORTLAND, ME 04112 799-8485 NORMAN A. ABOOD, ESQ. [COR NTC] 606 ADAMS STREET TOLEDO, OH 43604-1420 419/242-8489
GEORG WIKMAN plaintiff	SAMUEL SHERRY, ESQ. (See above) [COR LD NTC] NORMAN A. ABOOD, ESQ. (See above) [COR NTC]
v.	
RICHARD DESOTO defendant	JAMES B. BARTLETT 368-8100 [COR LD NTC] JAMES B. BARTLETT, P.A. 226 YORK STREET P.O. BOX 836 YORK, ME 03909-0836 207/363-8100
SWEDISH HERBAL INSTITUTE LTD, MAINE CORPORATION defendant	JAMES B. BARTLETT (See above) [COR LD NTC]
SWEDISH HERBAL INSTITUTE, LLC defendant	JAMES B. BARTLETT (See above) [COR LD NTC]

of application of the terms of the contract on the Motion to Dismiss. Plaintiffs cannot have it both ways.

SWEDISH HERBAL INSTITUTE, LTD NEW YORK CORPORATION defendant	JAMES B. BARTLETT (See above) [COR LD]
SHI VENTURE CORP defendant	JAMES B. BARTLETT (See above) [COR LD NTC]